Sysco Food Services of Cleveland, Inc. *and* Jeffrey A. Travnik Case 8–CA–35780

August 25, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On June 7, 2006, Administrative Law Judge David I. Goldman issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Sysco Food Services of Cleveland, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] No exceptions were filed to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(3) by discharging employee Jeffrey A. Travnik.

[2] Member Schaumber notes that context is key in most 8(a)(1) cases, and this one is no exception. The statement found to be coercive was uttered in a casual, consensual, and off-the-record discussion about potential reinstatement for Travnik based largely upon the Union's business agent Sayre's long-standing working relationship with the Respondent's director of warehousing Spadaro. The record shows that many hundreds of grievances were filed annually in what is seemingly a less than harmonious labor/management environment. As such, one might easily find that Spadaro's reference to the filing of "stupid grievances" was more innocuous (and possibly accurate) than it was coercive. One might also question the wisdom of bringing the full force of the Federal government to bear in prosecuting such a violation. However, given the judge's thoughtful analysis, careful credibility resolutions, and direct observation of the witnesses, Member Schaumber cannot conclude that the judge erred in finding that Spadaro's statement might, in context, have had the effect of restraining or coercing employees in the exercise of their Section 7 rights. He therefore concurs in finding the violation.

Dated, Washington, D.C. August 25, 2006

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Iva Y. Choe, Esq., for the General Counsel.
Joseph N. Gross, Esq., of Cleveland, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

DAVID I. GOLDMAN, Administrative Law Judge. The General Counsel issued a complaint in this case on June 24, 2005, against Sysco Food Services of Cleveland (Sysco)[1] based on a charge filed by Jeffrey A. Travnik on April 22, 2005. Travnik was discharged by Sysco on November 4, 2004. The Government alleges that Sysco violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) when it discharged Travnik. The Government contends that Travnik's grievance-filing activities motivated the discharge. Sysco denies this, and asserts that the motivation for Travnik's discharge was violation of a Sysco work rule that prohibits theft, including "causing the Company to pay for time not worked." The Government also alleges that Sysco independently violated Section 8(a)(1) of the Act through statements made to Travnik by a Sysco supervisor at a December 2004 postdischarge meeting. The meeting was called by Travnik's union representative as part of an effort by Travnik and the Union to persuade Respondent to reinstate Travnik. Sysco denies that it violated the Act in this instance as well.[2]

This case was tried before me in Cleveland, Ohio, on March

[1] On my own motion I have amended the caption to delete reference to the parent company of Respondent. There are no allegations of wrongdoing, or even conduct by the parent company, Sysco Corporation. There was no evidence presented at trial, nor any argument directed towards showing that the parent and subsidiary corporations are single employers, or that the parent is liable for Respondent's conduct. Record references support an inference that the companies are closely related and management transfers between facilities are not uncommon. However, in the absence of any discernible reason for the caption to reference another (albeit related) corporate entity, I have struck Sysco Corporation from the caption.

[2] Sysco's answer raised as affirmative defenses, inter alia, contentions that the complaint failed to state a claim, its allegations were barred by the statute of limitations, and that the dispute should be deferred to arbitration. These defenses were not pursued at the hearing or advanced in Respondent's posthearing brief. In any event, they are not warranted based on the record, and I reject them without further discussion.

7, 8, and 9, 2006. Counsel for the General Counsel and counsel for Respondent filed briefs in support of their positions on May 16, 2006.On the entire record, including my observation of the demeanor of the witnesses and other indicia of credibility, and after considering the briefs filed by the parties, I make the following findings of fact, conclusions of law, and recommendations.

I. JURISDICTION

Sysco is corporation that markets and distributes food service products to customers throughout northern Ohio from its facility in Cleveland, Ohio. Its customers include schools, nursing homes, restaurants and other institutions requiring prepared food products. Sysco admits that in conducting its business it annually sells and ships goods valued in excess of $50,000 directly to points outside the State of Ohio. Sysco admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

For many years the International Brotherhood of Teamsters, Local No. 507 (Teamsters or Union) has represented a bargaining unit of Sysco employees (including Charging Party Travnik) for purposes of collective bargaining. The complaint alleges and I find that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. FACTUAL FINDINGS

A. Background

Sysco has operated from its current, newly constructed 450,000-square-foot facility at Grayton Road in Cleveland, Ohio since August 2004. Before then, and since 1992 when Sysco acquired Seaway Foods, Sysco operated from an older facility located on Aurora Road in Bedford Heights, Ohio.

The new Cleveland facility is made up of an office and warehouse area. There is also a separate garage area. The warehouse is divided into a freezer area (for frozen foods), a cooler area (for refrigerated items), and a dry area (for product stored at room temperature). The old Bedford Heights facility also had three similar warehouse areas. It also had three separate docks servicing the three warehouse areas: a freezer dock, a cooler dock, and a dry dock. The new facility in Cleveland has only two docks: a perishable or refrigerated dock, and a dry dock. The refrigerated dock supports frozen and refrigerated products. The dry dock supports nonrefrigerated products.

Sysco employs approximately 475 employees including approximately 230 bargaining unit employees represented by the Teamsters for purposes of collective bargaining. Sysco and the Teamsters are parties to a labor agreement covering the terms and conditions of the bargaining unit employees. This agreement became effective June 1, 2001, and by its terms will remain in effect until at least June 30, 2007.

Jeffrey Travnik began working at the Bedford Heights facility in 1989 when it was operated by Seaway Foods. In 1992 Travnik became an employee of Sysco when Sysco acquired Seaway and assumed operation of the facility. Travnik was a union member throughout his employment with Sysco. He served as an elected union steward for three terms beginning in 1994, and last served as a steward in 2001.

From 1996 until his termination in November 2004, Travnik held the position of checker/stockman, frozen returns, on the third shift (night shift). The standard hours for the third shift are 9 p.m. to 5:30 a.m., but Travnik sometimes started earlier, and sometimes worked later. Although his duties could vary based on supervisory directives, his chief responsibility was putting away "returns"—i.e., product that was returned to the facility by the daytime drivers. As his job title indicated, putting away frozen returns was the primary task of his job. However, in April 2004, the other employees who performed "returns" work on the third shift were reassigned, leaving Travnik responsible for third-shift returns generally, whether frozen, cooled, or dry products. On the dock Travnik would go thru pallets of returns, check for damaged or thawed product, pull off the old labels and return the product to the appropriate warehouse where it was put in slots. He would then scan the slots, which electronically recorded the product that had been returned and was available for reshipment. Travnik's work also required him to go to the driver checkin office to process drivers' bills, and other paperwork.

B. Grievance Filing Activity

The collective-bargaining agreement between the Teamsters and Sysco contains a fairly typical grievance procedure covering "any controversy or difference" arising between the Union and Sysco, or between any employees and Sysco. The grievance procedure culminates in binding arbitration for unresolved grievances that the Union chooses to pursue to arbitration.

Records submitted at the hearing (R. Exh. 8) establish that in 2001 approximately 287 grievances were filed by approximately 130 different lead grievants.[3] In 2001, the records indicate that Travnik was the lead grievant on eight grievances. In 2001, employee McFadden filed 12 grievances as a lead grievant, employee Brann filed 13, employee Dmitruk filed 11, employee Culp filed 10, and employee Shrader filed 9.

In 2002, the records (R. Exh. 9) show that approximately 293 grievances were filed by approximately 129 different lead grievants. Travnik filed 6 grievances (and signed 2 others that were initiated by other employee lead grievants). In 2002, employee McFadden filed 10 grievances as lead grievant, employee Schuler filed 9, and employee Thurber filed 7.

In 2003 (R. Exh. 10), approximately 343 grievances were filed by approximately 129 lead grievants. Travnik filed 3 grievances as lead grievant. Employee McFadden filed 17, employee Dmitruk filed 13, and employee Demchuk filed 10.

[3] By "lead grievant" I mean the individual who was the sole or first employee signatory to a grievance. Some grievances were signed by multiple individual employees. A few "group grievances" were submitted by the Union or a department within the facility on behalf of affected employees. These grievances are not counted as having a "lead" grievant, but are counted in the total number of grievances. The figures provided here are approximations. It is not possible to obtain an exact count based on the records submitted. However, these records, and the approximation of the number of grievances and lead grievants drawn from them do provide significant evidence regarding the consistent volume of grievances and grievants.

In 2004 (R. Exh. 11), the year of Travnik's discharge, approximately 418 grievances were filed by approximately 155 different lead grievants. Excluding the grievance filed over his discharge, Travnik was the lead grievant in 17 grievances in 2004. Employee Mullinex filed 15, employee Houston filed 14, employee Dmitruk filed 13, employee Stevens filed 10, and employee Inman filed 9.

In 2005 (R. Exh. 12), the year following Travnik's discharge approximately 359 grievances were filed by approximately 114 different lead grievants. In that year "heavy" grievers included employee Mullinex who filed 21 grievances, employees Dmitruk, E.R. Torowski and Schuler, each of whom filed 13, employees McFadden and Kropff filed 11, employee Fouquet filed 10, and employee Buckland filed 9.

As noted, in calendar year 2004, Travnik filed 17 grievances (excluding the grievance filed over his discharge). These grievances concerned a variety of work assignment issues, safety-related concerns, and overtime issues.[4] Travnik also signed on to two "group grievances" initiated by other employees.[5] Finally, Travnik filed a November 4 grievance over his termination. (GC Exh. 20.)

By all evidence, Sysco faithfully and routinely responded to the hundreds of grievances filed each year in accordance with the contractual grievance procedures. As the testimony and records demonstrate, Travnik filed grievances off and on throughout his employment with Sysco. Sysco's responses to all but one of Travnik's 2004 grievances were entered into evidence by the General Counsel. In most cases the responses disputed the assertion of a contractual violation. In two instances the responses indicated agreement with the issue raised by Travnik's grievance. (See GC Exhs. 12, 18). After Sysco's initial response to a grievance, the Union could request a grievance hearing meeting on the issue. The Union did not do so in every case, but Travnik testified that whenever he requested that his grievance be processed to a grievance hearing the Union would request one and a hearing would be conducted with Sysco. After grievance hearing meetings, Sysco's Director of Legal Affairs Ralph Knull would prepare a response stating Sysco's position in light of the grievance hearing meeting. At that point, if the dispute remained unresolved, the Union could process the grievance further by notifying Sysco of its intent to arbitrate the dispute.

Despite the large number of grievances filed each year, very few disputes reached arbitration. Knull testified that in the last 3 years there had been three arbitrations, two of which involved the same issue. Knull testified that at the time of the hearing in this case the Union had notified Sysco of intent to arbitrate 16 grievances, a number that could be reduced through further negotiations between the parties.

Travnik testified vaguely that he felt that some of the supervisors showed favoritism toward other employees. At one point in his direct testimony, with regard to Supervisor Craig McDonald, he attributed this favoritism to his grievance filing. However, on cross-examination he amended this and indicated that "I'm not sure why he [McDonald] treated me differently. I just know that there was favoritism played between the second shift guys and the third shift guys." (Tr. 114.) Travnik did testify that sometimes when he presented McDonald with a grievance McDonald would say "snide" things like "[n]ot another one. Oh geez what did I do now. Things like that." (Tr. 116). Travnik did not give any timeframe when these comments occurred. According to Travnik, McDonald always accepted the grievances, and handled them in accordance with the grievance procedure. "Everything was, everything was done yeah. . . . He'd turn it in to whoever, Ralph [Knull] or whoever got it. It was turned in. I got my answers." (Tr. 116.)[6]

The only other (predischarge) references to Travnik's grievance-filing were two comments alleged to have been made in June and July 2004 by Sysco V.P. of Operations Brian Cook. Travnik testified that in June Cook approached him on the freezer dock of the old Aurora Road facility. Travnik described the encounter as follows:

> I was checking through a pallet and I heard a voice behind said, how's it going? I turned around it was Brian Cook. I said, all right. He said, if you're filing all these grievances

[4] These included: a January 28 grievance regarding mandatory overtime (GC Exh. 26); a March 29 grievance requesting that a bid be put up for a Dry Returns third-shift position (GC Exh. 3); an April 12 grievance over the use of a shuttle driver to work for 1-1/2 to 2 hours in the returns department rather than assigning the work to a warehouse plant employee (GC Exh. 4); a May 5 grievance regarding the potential safety implications of manning reductions for the third-shift returns department that left Travnik the only employee working in that position (GC Exh. 5); a May 10 grievance objecting to a supervisor opening trailer doors and setting dock plates, work alleged to be bargaining unit work (GC Exh. 6); a May 11 grievance objecting to shuttle drivers removing product from the returns trailer, work allegedly assigned to the returns department employees (GC Exh. 7); a May 13 grievance objecting to a change in work rules that permitted shuttle drivers to pull out shuttle trailers (GC Exh. 8); four grievances filed on May 18 objecting to the safety implications of shuttle drivers and a supervisor calling out shuttle trailers, and other work assignment issues (GC Exhs. 9–11); two May 27 grievances regarding a work assignment (GC Exh. 12) and the possibility that a supervisor was performing unit work (GC Exh. 13); a May 31 grievance objecting to a supervisor "picking up small pieces of paper near the freezer doors" which was unit work (GC Exh. 14); a June 22 grievance asserting that the third-shift returns department employees can leave after 8 hours if certain other employees are removed from the area (GC Exh. 16); a July 21 grievance over a shuttle driver's performance of returns department work (GC Exh. 18); and a September 9 grievance objecting to not being offered overtime (GC Exh. 19a-b).

[5] Travnik was one of approximately 35 third-shift employees to sign a May 31 grievance objecting to Sysco's allowing three junior employees to work more overtime hours than the grievants. (GC Exh. 15). Travnik was one of approximately 12 employees signing a July 19 grievance regarding the use of temporary workers on the first shift. (GC Exh. 17.)

[6] MacDonald testified briefly but did not deny (and was not asked) whether he ever made such comments to Travnik. I credit Travnik's uncontested testimony on this point. I note that MacDonald was on medical leave in the fall of 2004. There was conflicting testimony about whether he was Travnik's supervisor, although it is undisputed that he was *a* supervisor and had the authority to supervise Travnik. However, he chiefly worked second shift and although their schedules overlapped was not Travnik's direct supervisor during much of the shift.

> and you're so unhappy here why don't you find work somewhere else or why don't you go work somewhere else and I told him that I was happy here. He said, it doesn't seem like you are. I said, I am. I continued about my work and he walked away.

Travnik relayed a second, similar incident that occurred in July 2004, when Travnik was standing by the memo board near the timeclock. Travnik testified to this incident as follows:

> I hadn't started my shift yet, I hadn't punched in yet and somebody from behind said, how was your vacation. I turned around it was Brian Cook. He was, he was on this side of me, my left hand side. And I said, vacation was fine. He said, I saw you were on family medical the week before, and I said, yeah. And he said, you still filing a lot of grievances. And at that point I just kept reading the memo board and he walked away.[7]

Cooks' comments were the final "grievance-related" comments made to Travnik until after his discharge. Indeed, after July, Travnik filed only one grievance prior to his November discharge.

[7] Cook flatly denied talking to Travnik in either June or July 2004. I credit Travnik's account. I found Travnik's demeanor in relating this incident impeccable. Although he could not recall the time that the first incident occurred, otherwise his recollection seemed sure and he described the events, location, and the probable dates with specificity and completeness that seemed genuine and plausible. His demeanor struck me as honest, not contrived. It is not surprising that these two similar and seemingly chance encounters with the second highest ranking Sysco official stuck in his mind. By the same token, the events may have had less significance for Cook. While Cook denied talking to Travnik in June or July, he was clear that during this time he was "consumed" with efforts to facilitate the move to the new Cleveland facility. Cook was extraordinarily busy during this period, shuttling between sites, making arrangements for the move, overseeing construction of the new facility, and negotiating work rule changes with the Union. By itself his work on the move "probably was a job and a half, two jobs in one day. " Cook may not remember talking to Travnik. But I am confident the conversations occurred. On direct examination Cook denied being on the dock and able to talk to Travnik between 9 p.m. and 5:30 a.m. in July 2004, but on cross-examination he testified that in June 2004 he arrived at the Bedford Heights facility as early as "[f]ive, six o'clock in the morning." In addition, that summer Travnik sometimes began work some hours before the normal start time for third shift. Thus, their schedules may have occasionally overlapped. On cross-examination Cook admitted talking to third-shift supervisors in the morning, after first denying any recollection of such meetings. His office in the old facility, which he kept until early July, was adjacent to the freezer, and thus near the freezer dock where Travnik alleges the June encounter occurred. Travnik contended that during the July encounter Cook was dressed in blue shorts, a blue cap and a Sysco Safe T-shirt. Cook denied only that *in June* he was not on the dock in shorts. He denied owning a Sysco Safe t-shirt (but admitted owning other Sysco t-shirts) and admitted that he owned several Sysco ball caps. He denied owning denim shorts, but Travnik had not testified that Cook was wearing denim. In sum, Cook's "denial" of the specific clothing Travnik identified him in largely did not join the issue. Whether Travnik was mistaken about Cook having a Sysco Safe t-shirt (as opposed to some other Sysco t-shirt), or Cook was being less than forthright about clothing is a minor issue to me. Travnik's account of these incidents rang true.

C. Work Rule 1-4

Sysco maintains work rules that are found in the union employee handbook. These work rules include work rule 1-4 (R. Exh. 6) which states:

> Theft including but not limited to falsification of payroll records, consuming Company products without consent of a supervisor (regardless of value), sleeping or otherwise causing the Company to pay for time not worked, unauthorized removal of Company property from the premises and/or delivery to an unauthorized person or location.

Work rule 1-4 provides further (and explicitly) that "Discharge" is (or at least, may be) the penalty for the "1st Violation."

At the hearing, uncontradicted evidence was presented regarding eight other employees terminated—both before and after Travnik's November 2004 termination–for violation of Work Rule 1-4. These included:

> Robert A. Vitko—discharged for violation of work rule 1-4 in October 2002. His hire date was November 16, 1998. A videotape investigation of Vitko and another employee was undertaken after suspicion was raised that they were taking excessive breaks and lunch. Vitko was discharged when Respondent reviewed the videotape and believed it supported the charges. However, the videotape did not support the charges against the other employee and he was not terminated.
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> David Schuster—discharged for violation of work rule 1-4 on March 18, 2003. Schuster had a hire date of February 6, 1988. He was discharged based on review of video surveillance tapes that showed excess breaks and lunch time totaling 5 hours and 47 minutes over the course of four work days. (GC Exh. 36.)
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> Anthony Lance—discharged for violation of work rule 1-4 on March 18, 2003. Lance had a hire date of February 8, 2000. He was discharged based on review of video surveillance tapes that showed excess break and lunch time totaling 4 hours and 25 minutes over course of four work days. (GC Exh. 44.)
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> Timothy Goodreau—discharged for violation of work rule 1-4 on March 15, 2005. Goodreau's hire date was August 13, 2000. He was discharged for taking excess breaks and lunch totaling 1-1/2 hours over the course of eight work days. In addition, Sysco's grievance response setting forth the basis for his discharge cited the length of time Goodreau took to fill specified orders. (GC Exh. 46.) Goodreau had previously been discharged for violation of work rule 1-4 in 2003, based on videotape of his actions, but in the grievance process it came out that he was coming to work early and was being videotaped prior to the start of his shift. The 2003 discharge was expunged and Goodreau was reinstated, only to be discharged in 2005.
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> John Unkefer—discharged for violation of work rule 1-4 on January 31, 2006. Unkefer's hire date was June 1, 1981. He was discharged based on review of video surveillance tapes that showed excess breaks and lunch totaling 5 hours and 14 minutes over the course of five work

days. (GC Exh. 32.) In 1998 Unkefer had been provisionally discharged but was reinstated for what appears to be excessive breaks and lunch, and poor productivity. He had been counseled repeatedly over the years for poor productivity. (GC Exh. 35.)

Brad Shields—discharged in September 7, 2005 for violation of work rule 1-4 during the course of one day based on review of video tape and for a fifth occurrence of a failure to meet productivity standards, an offense that is subject to progressive discipline. (GC Exh. 48.) Shields' hire date was September 1995.

Robert Francis—suspended May 27, 2005 pending investigation for violation of work rule 1-4, based on gaps in his location report and a very low productivity percentages. (GC Exh. 50.). However, Francis was reinstated because at the grievance hearing it was demonstrated that Francis, who had only recently been put into the order selector position from which he was terminated, had been using an incorrect procedure after breaks and lunch that made his scanning reports and productivity figures appear as if he was not performing any work (and therefore it appeared that he was still taking lunch or break) when he was actually back at work.

Larry Washington—discharged in 2005 for a violation of work rule 1-4. A videotape was made of Washington covering 4 days. Respondent's position was that Washington was paid for time not worked but the record does not reveal the amount of this time. Washington is described in the record as a "longtime employee" but the record does not reveal his hire date.

D. Travnik's Discharge

Travnik was discharged November 4, 2004. Respondent's witnesses testified extensively to the events surrounding Travnik's discharge. For the most part, their testimony was consistent and mutually corroborative of one another. I have noted some of the discrepancies but they are minor and do not detract from Respondent's essentially consistent and uncontradicted account of the process of Travnik's termination.

Edward Dowd assumed the position of director of outbound warehousing at Sysco on September 15, 2004. Prior to that he was employed for 7 years at Sysco of Philadelphia. In his position as director of outbound warehousing Dowd oversaw the selection and loading of products going out on the trucks. He typically worked 4 p.m. to 7 or 8 a.m. Dowd directly supervised four supervisors to whom a total of 120 employees reported. Dowd reported to Michael Spadaro, who in September 2004 had returned to Sysco and assumed the position of director of warehousing. Spadaro had a long career at Sysco. He worked as a manager at Seaway Foods and left for Sysco in 1990. He worked for Sysco from 1990 until May 2003, and held Dowd's position of director of outbound when he left Sysco. Spadaro returned in September 2004 and assumed the position of director of warehousing, from which he reported to Brian Cook. Dowd and supervisors Chuck Leiben and Chris Thomas reported to Spadaro.

Dowd described the Sysco operation, which had only weeks before moved to the new Cleveland facility, as being in "disarray" when he began work in September. Trucks were delivering product late and Dowd described the volume of returns as "very heavy" at this time. One evening in October Dowd was assessing the returns situation and looked for but could not find Travnik around the returns area. He asked one of the supervisors if Travnik was on break and was told that it was not Travnik's breaktime. The next day Dowd raised Travnik's absence with Spadaro.

Spadaro stated that Dowd had come to him and said that he tried to find Travnik the night before but had been unable to find him and said, "I have a problem with this." Spadaro also testified that Dowd had a problem with Travnik's "puts"—i.e., the amount returns that Travnik had put back in storage and scanned. Spadaro testified that Dowd told him that "Jeff has very few puts and there's quite a few returns left."[8]

Spadaro told Dowd that he would look into it and see what had happened. Spadaro contacted Philip Witnik, Sysco's safety and security manager since 2000.

Witnik has been employed at Sysco since 1991 and in management since 1994. In his current position he is in charge of, among other things, operation of a sophisticated security system that contains over 60 surveillance cameras, each of which is linked to one of five "multiplex" systems that can record video and preserve the information on a hard drive system. As currently configured, each multiplexor can maintain about 30 days of video, depending on the number of cameras plugged into it. It then "dumps" the older video as it downloads newer recordings.

This multiplexor system was installed for the first time in the new Cleveland facility. The Bedford Heights facility also had a surveillance system but it was a more conventional VCR operation. Both the old system (at the old facility) and the new multiplexor system (at the new facility) have been used to monitor the whereabouts of employees. Using a combination of information generated from the Galaxy "swipe" system used in the plant—to enter a room or a building in the facility an employee had to swipe a card which creates a record identifying the individual's movement through the facility—and the Sysco Warehouse Management Systems (SWMS) location reports—information generated by the scanning of product by employees—Witnik could identify the location of an employee during the shift. He could then call up the video footage from the camera mounted in that location at that time, and he would be able to view the employee's actions and conduct. By tracking the movement of the employee recorded by the Galaxy and SWMS generated information, and watching the employee on the video tape, it was possible to follow an employee's movements throughout his entire shift. Not every location in the facility could be viewed with the cameras, but enough could so

[8] Dowd did not testify to this and "could not recall" whether he "investigated what returns Mr. Travnik had completed or not completed" before approaching Spadaro. I credit Spadaro's version. When Dowd complained to Spadaro he did not just complain about not being able to locate Travnik, but also that the returns were not being "put" away fast enough. Although the heavy returns were not Travnik's fault—the operation was in "disarray" at the time—mounting returns was the problem Dowd was dealing with when he was looking for Travnik.

that it was possible to watch much of an employee's work activity and all of his break activity.

Spadaro approached Witnik and stated that he was having problems with returns on the third shift and asked Witnik to use the surveillance system to investigate what was going on during the night shift on the evening of October 17. Travnik was the only returns employee on third shift so that naturally led to a review of his activity. Spadaro wanted Witnik to review the tapes, and "[t]o observe Jeff Travnik to see what was going on." Spadaro offered that that there could have been a spill, or heavy items on the dock that tied Travnik up: "You know he could have been doing things that were strictly okay." In the past Spadaro had asked Witnik to make a similar review of tapes in other circumstances concerning other employees.

Using a combination of Galaxy swipe card information and SWMS reports, Witnik called up video for the evening of the 17th and 18th. He estimated that he viewed about 8 hours of video in about an hour. Witnik confirmed with Spadaro the times that Travnik was supposed to take breaks and lunches and then made up a three page handwritten report that he provided to Spadaro (R. Exh. 19(b)(1-3)) the next day. The report listed break, lunch, and bathroom time taken by Travnik, and Witnik told Spadaro that it looked like Travnik was taking breaks and lunch beyond what was permitted. Witnik may have mentioned excessive bathroom time to Spadaro as well. Spadaro testified that he and Witnik then watched "points" of the video together.[9] Spadaro went to Ralph Knull about the situation, telling Knull that there was a video of Travnik engaging in "theft of time." Spadaro brought with him a copy of Witnik's handwritten account of the time of Travnik's breaks, lunch and bathroom visits. With that document in hand, Knull went to Witnik's office and watched the video footage of Travnik for the October 17-18 overnight shift. After viewing the video Knull called Spadaro to his office. They discussed whether it showed a violation of work rule 1.4. Knull thought that it did but suggested that additional days of footage be reviewed to see if this "was a one day occurrence or if it was happening all the time." Spadaro told Witnik to follow-up and complete a similar analysis for the other days of the week of October 17. Witnik spent 15–20 hours performing the same process for the remainder of the week of October 17 as he had for the initial evening shift. When he completed his review, including the creation of handwritten notes detailing breaks, lunch, and bathroom time that appeared on the tapes (R. Exh. 19(c)-(e)), he provided the notes to Spadaro and explained to Spadaro that "there was a significant amount of theft of time." Spadaro watched the tape in Witnik's office. According to Spadaro, what he saw on the tapes was Travnik taking "excessive breaks and lunches. I saw him actually hiding behind a wall or whatever from Chris Thomas, which I can remember very clearly."

Later the week of October 24 Spadaro met again with Knull. Spadaro had with him the handwritten notes from Witnik recounting the video footage incidents for the entire week that he had reviewed. Knull scanned the notes. Knull testified that at this second meeting Spadaro recommended that Travnik be terminated for violation of work rule 1.4.[10]

Spadaro directed Witnik to transfer the relevant portions of the tape to DVD and to turn the handwritten notes of the video footage into a typed report. In follow up to this, Witnik transferred his handwritten notes to typed copy on a word processing program and transferred the video to DVD, using a new Magnavox system recently obtained by Sysco. As he made the DVDs, Witnik compared the notes to the tape once more to check for accuracy. Witnik did not transfer every incident on the handwritten (or typed) notes to the DVD, but focused on incidents that appeared to show excessive break, lunch, or bathroom time, although other footage simply captures Travnik's movements. The footage on the typed report that is bolded (see R. Exh. 7) is included on the DVDs. The non-bolded is not. After completing the transfer of footage to the DVD's, Witnik submitted the DVDs and the typed report to Spadaro. Witnik gave Spadaro a brief overview of the report and explained that "there was a significant amount of breaks and lunches and time in the bathrooms."[11]

Spadaro reviewed the DVD's in full. He then went to Knull with the DVDs, and, according to Spadaro (see n.10) at this meeting recommended that Travnik be terminated for theft of time. Spadaro and Knull discussed the breaks to which Travnik was entitled. Knull said he would review all the DVDs and make a decision on Spadaro's recommendation.

Knull testified that up to this point in time no decision to terminate Travnik had been made, but he was keeping Cook apprised of the situation. After watching the DVD's and comparing them to Witnik's typed report (R. Exh. 7) Knull concluded that "Mr. Travnik did indeed violate Work Rule 1-4, and Mr. Spadaro's recommendation to terminate Mr. Travnik should be followed through on."

Spadaro then initiated a termination notice by contacting Sysco's HR department. For this termination (and past terminations) the practice was to require each level of management to sign the notice before the termination could be effectuated. The termination notice reflects that Spadaro, Knull, and Cook signed the notice on November 3, 2005. After Spadaro, Knull, Cook, and President and CEO Alan Hasty had signed the termination notice, Spadaro contacted Dowd and told him "that he needed to terminate Jeffrey Travnik for work rule 1-4." Spadaro provided Dowd with the termination notice.

[9] Witnik could not recall watching the footage with Spadaro or Knull but I credit both Spadaro and Knull's specific recollections of watching video footage at various times in Witnik's office. They relied upon Witnik to operate the equipment.

[10] I note that this differs from Spadaro's account. He indicated that he recommended Travnik's termination a few days later after viewing DVD's of the footage created by Witnik.

[11] Witnik estimated that he provided Spadaro with "roughly around eight DVD's." Respondent maintains that there was only five DVD's produced, one for each shift of the week. On cross-examination Witnik denied testifying to there having been "roughly around eight DVD's" and asserted, wrongly, that he had "said in between five to eight DVD's." His cross-examination followed the playing of all five videos and was the one instance where I felt that Witnik was coloring his testimony to fit Respondent's case. Having said that, I accept Witnik's testimony that he turned over all the videos he made to Spadaro. Witnik testified that he made "roughly 8" but, by all evidence, there were only five.

Dowd called Travnik to his office over the P.A. system. Union Steward Mike Morris was also present. Dowd read the termination notice to Travnik and Morris. The notice stated as the "Reason for Termination: "Violation of Work Rule # 1-4: 'Theft including but not limited to . . . otherwise causing the Company to pay for time not worked.'" (R. Exh. 1(a)).

Dowd orally added that the violation was in reference to a particular date, but at trial Dowd could not remember to which date he referred. Dowd told Travnik he was terminated and asked for his punch card and employee I.D. Dowd did not remember any conversation with Travnik regarding the substance of the offense. Travnik testified that he told Dowd that he hadn't stolen anything and hadn't taken excessive breaks and lunch. Dowd left his office to give Travnik and Union Steward Morris time alone to talk and fill out a grievance. Travnik testified that he requested the time to file a grievance; Dowd testified that he unilaterally offered to leave his office to give Travnik time to file a grievance. In any event, when Dowd returned, about 15 minutes later, Morris and Travnik presented him with a grievance challenging the termination. Travnik's grievance (GC Exh. 20) stated: "was terminated for theft of time. I would like a meeting to discuss this issue. I feel that this termination was unjust. (Work Rule 1-4.)"

Dowd forwarded the grievance to Knull. Spadaro received a copy of the grievance the next morning. One of Knull's responsibilities as director of legal affairs was to respond to the grievance. Knull used the investigation that he had relied upon to discharge Travnik as the basis for the response to the grievance. As is the practice with grievance responses, Knull prepared a letter to Al Mixon, secretary treasurer of the Union that responded to the grievance and outlined Sysco's position on the discharge. Spadaro discussed the response with Knull and reviewed the letter before it was sent. The letter was sent to Mixon and also mailed to Travnik and a host of Sysco and union officials. This grievance response letter (GC Exh. 21), dated November 10, 2004, began by citing the breaks permitted employees pursuant to article III, paragraph 1 of the collective-bargaining agreement,[12] and cited work rule 1-4 of Sysco's work rules.[13] The letter then stated:

> On October 17, 2004, Jeffrey Travnik was videotaped utilizing ninety-four minutes for lunch, breaks and wash-up, which is twenty-four minutes more than he is entitled to under the aforementioned provisions of the Agreement. On October 18, 2004, Mr. Travnik was videotaped utilizing eighty-six minutes for lunch, breaks and wash-up, which is sixteen minutes more than he is entitled to under the aforementioned provisions of the Agreement. On October 19, 2004, Mr. Travnik was videotaped utilizing eighty-seven minutes for lunch, breaks and wash-up, which is seventeen minutes more than he is entitled to under the aforementioned provisions of the Agreement. On October 20, 2004, Mr. Travnik was videotaped utilizing one hundred and fourteen minutes for lunch, breaks and wash-up, which is forty-four minutes more than he is entitled to under the aforementioned provisions of the Agreement. On October 21, 2004, Mr. Travnik was videotaped utilizing ninety-one minutes for lunch, breaks and wash-up, which is twenty one minutes more than he is entitled to under the aforementioned provisions of the Agreement. Therefore, because Mr. Travnik caused the Company to pay him for two hours and two minutes of work during the week of October 17th, which Mr. Travnik did not actually work, Sysco Cleveland acted in accordance with Rule 1-4 and terminated Mr. Travnik's employment on November 3, 2004.

After receipt of Sysco's response, the Union contacted Spadaro to request a grievance hearing, the next step in the grievance procedure. The grievance hearing was set for November 18, 2004. It took place in the conference room next to Knull's office. Present for Sysco were Spadaro and Knull. For the Union, Travnik, Union Steward Joe McFadden, Union Trustee Dennis Flora, and Union Business Agent Larry Sayre attended the grievance hearing.

Sayre began the meeting by asking for the basis of the discharge and requesting to see the evidence on which Sysco based Travnik's termination. Spadaro read the November 10 grievance response to the group out loud. Knull said that the video showed Travnik taking too long on lunches and breaks for a 5-day period. Knull had all 5 days of DVD tapes in the room but told Sayre that they would show "the worst offending day," which was October 20. After viewing the DVD, Sayre asked Travnik if he had anything to say. Travnik "indicated that he was having some issues with his mother-in-law, that were causing quite a bit of stress on him and that that was causing him to have vomiting and diarrhea, and that may be the reason for—uh, some of the issues related to the breaks." Either Spadaro or Knull replied that the bathroom breaks were not relied upon as a basis for the discharge. During the meeting there was also conversation between Travnik and Knull regarding a portion of the video where Travnik was carrying his lunch box into the breakroom office. Travnik said that he wasn't going to lunch during that time, but was going to look up product information for his job. There was also conversation about Travnik taking his 15-minute break at the end of the day. Travnik indicated that he had been doing that for a long time. Travnik raised at the meeting that he was entitled to a 10-minute freezer break, although Spadaro said that he was not. Travnik also mentioned that he believed he was entitled to

[12] The letter stated:

> Article III, paragraph 1 of the July 1, 2001 Agreement between Sysco Cleveland and the Union (Agreement) states that: "Each employee shall be allowed a fifteen (15) minute break for physical relief after two and one-half (2-½) hours of work and a further fifteen (15) minute break for physical relief after five (5) hours of work . . . Wash-up time of five (5) minutes before lunch break and five (5) minutes before the shift ends." In addition, Article III, paragraph 15 of the Agreement states that" "Each employee is to receive during each working day, an unpaid lunch of not less than thirty (30) minutes, not later than five (5) hours nor sooner than three (3) hours after starting work."

[13] With regard to work rule 1-4, the letter stated:

> Work Rule 1-4 of Sysco Cleveland's Union Employee Handbook specifically states that the first violation of the following shall result in discharge: "Theft including but not limited to . . . otherwise causing the Company to pay for time not worked . . . ."

travel time to go from breaks or lunch back to his worksite.

At the grievance hearing, neither the Union nor Travnik alleged that Travnik's discharge was related to his grievance-filing activity. The Union asked for time alone with Travnik at which point Spadaro and Knull left the room for approximately 15–20 minutes. At that point, Travnik and the union representatives came out and requested Travnik's reinstatement. They appealed to the fact that Travnik was a long-term employee of Sysco. The Union also requested to see the remaining tapes.[14] The Union asked for Sysco's response on the grievance. Spadaro indicated that they would get the Union a response.

In the next few days Spadaro, Knull, and Cook met and decided that Sysco would not rescind the discharge. Spadaro explained their reasoning as follows:

> Well the fact that we had already terminated people for stealing time and the fact that Jeff may have had personal problems, even if he was sick, it was something that he should have came to a supervisor with before hand. We weren't counting all his times for his bathrooms anyway so if it was just sick, he didn't look sick during his breaks and his lunches while we were observing him. We gave him the benefit of the doubt for the bathroom time. It was still excessive theft of time for breaks and lunches.

After that, Knull drafted the grievance hearing response to the Union. This response (GC Exh. 22) was dated November 24, 2004, and, like the earlier response to the Union, was addressed to Al Mixon. The letter's first three paragraphs were identical to the previous November 10, 2004 response: describing the breaks in the collective-bargaining agreement, Sysco's work rule 1-4, and a description of the excessive lunch and breaks viewed on the video. The letter then adds the following:

> A grievance hearing was held between Sysco Cleveland and the Union on November 18, 2004 regarding Mr. Travnik's November 4, 2004 grievance (see attached). At the hearing, Mr. Travnik and the Union stated that, during the past few months, Mr. Travnik has been dealing with personal situations that have put him under extreme stress and pressure. Mr. Travnik alleged that, as a result of such pressure, he was vomiting and had diarrhea during the week of October 17th and that such conditions caused him to take excessive lunches and breaks. The Union requested that the Company take this information into consideration and reconsider its decision to terminate Mr. Travnik's employment.
>
> Though Sysco Cleveland sympathizes with Mr. Travnik's personal situations, it cannot tolerate Mr. Travnik's actions of causing the Company to pay him for two hours and two minutes of work, during the week of October 17th, that Mr. Travnik did not actually work (particularly since the two hours and two minutes of time did not even include numerous, additional bathroom breaks that Mr. Travnik utilized during the week of October 17th). Therefore Sysco Cleveland will not reconsider its decision to terminate Mr. Travnik's employment for violation of Work Rule 1-4.

Article XIV, paragraph 3 of the labor agreement provides that arbitration is the next step for unresolved grievances. In this case the Union did not seek to bring the Travnik discharge grievance to arbitration. In April, 2005 Travnik was notified by the Union that his discharge grievance was not going to arbitration.

E. The Meeting at Bob's Big Boy Restaurant

A few weeks after the grievance hearing Sayre suggested to Travnik that perhaps Spadaro "might be able to do something to get [Travnik] back." Sayre had known Spadaro for 15–20 years, having worked under him at Sysco in years past. Sayre contacted Spadaro and requested that he meet with Sayre and Travnik to "see if we can get this resolved." Spadaro testified that in asking for the meeting Sayre told him that Travnik "feels really bad about what happened. He needs a job." Spadaro agreed to meet.[15]

A week before Christmas 2004, Spadaro, Sayre, and Travnik met at the Bob's Big Boy restaurant in Valley View, Ohio, close to the Local union hall. All three participants in the meeting testified and gave somewhat different accounts of the meeting.

Travnik testified that Spadaro came in and sat down at a table with Travnik and Sayre and said:

> "let's cut through all the bullshit. You filed too many fuckin' grievances. You're, you know, you're killing me with these grievances. There's just too many of them." I told him that I didn't feel that I was filing too many grievances. He told me, "well you are. They're always—they're all over my desk." And I said well I didn't feel that I was. He said, "you know, if I go to bat for you and try to get you back and talk to this corporate guy, whose name I don't remember, that are you going to kill me with these grievances, you know, be running around like an asshole." And I told him no that I would cut back on my grievances and I also mentioned that the place was, had been a nicer place since, you know, he had come back. Friendlier, I guess.

Travnik testified that this was the sum of the conversation and at that point "Larry and Mike started talking about some Local [Union], some stuff going on at Sysco but that was it"

[14] Sayre testified that he wanted to see the other videos but Knull and Spadaro did not have time to show the remaining videos that afternoon. In December Sayre called Spadaro several times and requested to view the remaining tapes, but Spadaro "kept saying Mr. Knull's out of the office or he's going to be out of the office." The Union never viewed the remaining tapes.

[15] In his testimony, Spadaro repeatedly stressed—with and without prompting by counsel and to an extent that his preparation on this score was transparent—that the meeting occurred because "Larry Sayre asked me if I would do him a favor." (Tr. 479.) ("Larry said look would you do me a favor, would you meet with me and Jeff outside of work just to hear what he has to say" (Tr. 479–480); "This was not something that I was doing for the Company or as a Company representative. I did it as a favor to Larry" (Tr. 483); "I went there as a favor and they wanted me to get involved" (Tr. 483) "I talked to Jeff and I told him that since they wanted me to do them a favor . . ." (Tr. 146.).) Spadaro also declared that the meeting was not "authorized" by Sysco. (Tr. 480.) As discussed infra, I do not believe that this testimony can immunize Respondent from responsibility for Spadaro's statements.

regarding his reinstatement. Travnik estimated that the conversation lasted between 15 and 30 minutes.

Spadaro gave a slightly different account of the conversation:

> Larry thanked me for coming. Jeff talked pretty much—said he was sorry about what had happened. He, once again, stated some of the problems he was going through. And actually I kind of understood some of them with his mother-in-law and I had some mother-in-law problems so we talked. He wanted me to get involved personally.
>
> I talked to Jeff and I told him that since they wanted me to do them a favor and stick my neck out for them that I would expect him to bust his ass. I would expect him to do whatever the Company needed. I would expect him if we need to work overtime he'd work overtime. I told him that I didn't want him to make an asshole out of me. I didn't want him to write any stupid fuckin' grievances. I expected him to be a real asset to the Company and not make a fool out of me.

On cross-examination, Spadaro initially denied saying that he actually told Travnik to "forget about those stupid fucking grievances," but admitted it when confronted with an affidavit he previously provided to the Region that contained that statement. Spadaro said he "forgot he said forgot."[16] Spadaro testified that Travnik acceded to his "spiel": "Jeff said that he would bust his ass, he'd do what he needed to do."

Sayre also testified about the meeting. He professed to remember little. Sayre testified that Travnik said "[t]hanks for having the meeting. Let's see if we can move forward with all of this and put it behind us." Sayre said that he asked Spadaro if he could talk to Gary Tomes—a Sysco manager that Sayre believed responsible for rehiring Spadaro—about getting Travnik "back in the door." Sayre testified that Spadaro said "he'd see what he can do." Sayre could not recall any reference to Travnik's grievance-filing activity. He did not recall Spadaro setting any conditions for helping Travnik get his job back. He did not recall Spadaro warning Travnik that if he "stuck his neck out for him" that Travnik should not embarrass him. Sayre did not recall Travnik trying to explain or justify excess breaks or lunches. Sayre did not recall Travnik saying anything about being sick at work.

Travnik was not reinstated. Some time after his meeting with Sayre and Travnik, Spadaro approached Cook and told him that the Union was pushing hard to have Travnik reinstated. Cook's response was that Travnik had violated work rule 1-4, that Sysco had terminated others for similar incidents, and there was no reason to alter the discharge. That was the end of the matter.

[16] I think the variance in testimony is without significance. Spadaro's initial testimony—that he didn't want Travnik "to write any stupid fuckin' grievances"—is no more exculpatory and no less damaging than his subsequent admission that he said Travnik should "forget about those stupid fucking grievances."

F. Credibility Resolutions Regarding the Restaurant Meeting

As to this meeting, none of these three witnesses were entirely satisfactory. Sayre remembered nothing with regard to the key comment—Spadaro's reference to Travnik's grievance-filing activity—or much of anything else, despite the fact that Travnik and Spadaro both testified to a version of the grievance-filing comment. I have no doubt that it was said, indeed, Spadaro admits it. I am cognizant that the trial in this case—but not the restaurant meeting—occurred long after the Union had decided not to take Travnik's case to arbitration and long after Travnik had brought—and then dismissed—legal action in Federal court that necessarily implicated the Union's handling of his grievance and refusal to proceed to arbitration.[17] This lawsuit—along with a reticence to stir up long settled labor-management decisions (from the Union's perspective)—may have contributed to a lack of effort by Sayre to struggle to recall the details of the conversation. And yet I do not discount Sayre's testimony in the following sense. Absent the conclusion that the Union was conspiring with Sysco to allow Travnik to be illegitimately discharged, or otherwise to breach its duty of fair representation to Travnik—propositions for which there is no evidence and for which the calling of the restaurant meeting is itself evidence to the contrary—I think that Sayre's lack of memory suggests that what was said at the meeting was not particularly shocking or offensive to him as a union representative.

With that in mind, I consider Travnik's account. Unlike his detailed and specific account of his—comparatively innocuous—encounters with Vice President Cook, Travnik recalled less about the meeting with Spadaro. All he recalled was Spadaro's comment about his grievance-filing. In Travnik's version of the meeting Spadaro had no other complaint, and rushed to "cut through all the bullshit" and complain about Travnik's grievance filing. It was the beginning and end of the discussion. I thought that on this score, Travnik's testimony was not impressive, both in demeanor and recollection of detail. The specificity and detail that Travnik provided regarding the encounters with Cook are in contrast with the truncated account he gave of his postdischarge meeting with Spadaro. While the incidents with Cook were important, they were not as important to Travnik as the meeting with Spadaro, they occurred without notice, and they happened nearly three times as long ago as the postdischarge meeting with Spadaro.

I also believe that if Spadaro's comments had been as focused on grievance filing as testified to by Travnik, Sayre would have taken notice, and Sayre would have reacted. But Sayre remembers nothing about it and neither Travnik nor Spadaro recall Sayre commenting on or reacting particularly to anything Spadaro said. There also some reason to doubt the

[17] Travnik had wanted the Union to take his grievance to arbitration. Ultimately he filed, but then voluntarily dismissed a 301 (29 U.S.C. § 185) lawsuit against Sysco for his termination. Given that the labor agreement's grievance arbitration procedure was intended to provide the remedy for breaches of that contract, in order to succeed in his Section 301 suit Travnik was required to prove that the Union breached the duty of fair representation it owed to him. See *Vaca v. Sipes*, 386 U.S. 171, 185–187 (1967).

plausibility of the testimony. Spadaro had only returned in September 2004 to Sysco. The bulk of Travnik's grievance-filing activity had ended in May. By the end of that month he had filed 14 grievances. Excluding his discharge grievance, Travnik filed only three more grievances (where he was sole or lead grievant) after May. The evidence shows that Travnik's grievances were routinely responded to within a week or two. (The labor agreement requires a response within 2 weeks.) Many appear to be over relatively small matters and probably did not go on to a grievance hearing. Respondent's Exhibit 18 at page 11 lists only three Travnik grievances among the group in 2004 for which there was a grievance hearing response (and one of those obviously was his discharge grievance). The bulk of Travnik's grievances were dealt with by the time Spadaro returned to Sysco. In May or June, Travnik's grievances were "all over [somebody's] desk," but by September when Spadaro returned to Sysco, and particularly by December when the meeting occurred, it seems unlikely that these grievances were a pressing problem for Spadaro.

Spadaro was not the perfect witness either. There was an informality to him—during the testimony and throughout the hearing—that was unusual. He may have just been uncomfortable and overcompensating for it. After all, I am sure it was not lost on Respondent or on Spadaro, that absent Spadaro's comments to Travnik at the restaurant, it is unlikely that a complaint would have issued in this case. Indeed, a charge may never have been filed. Having said this, his demeanor was not inconsistent with what appeared to be forthright testimony. Spadaro had obviously thought a lot about what was said at the meeting and his testimony gave a fuller account of the meeting than any other witness. Both in his testimony and affidavit from June 2005, Spadaro did not deny the substance of the comment that is the lynchpin of the General Counsel's case. If his version did not highlight Travnik's grievance-filing as much as Travnik's neither did it whitewash it. In other words, if Spadaro was lying he would have either denied the comment altogether, or offered something less objectionable than telling Travnik to stop "writing" or to "forget about" his "stupid fucking grievances" (phrasing that is not something one invents to escape liability and that was not testified to by any other witness). I credit Spadaro's account. His version is different from Travnik's in two significant ways: the comment regarding Travnik's grievance-filing is less lengthy and part of a list of items which he admonished Travnik to correct if Spadaro was going to go to bat for him, not the only thing mentioned. While it is not reasonable to believe that Spadaro recalled everything from the meeting,[18] I believe his account most accurately and fully captures the gist of what was stated.

IV. ANALYSIS AND CONCLUSIONS

A. The Independent 8(a)(1) Allegation: The meeting at Bob's Big Boy Restaurant

Section 8(a)(1) of the Act provides that "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [of the Act]." 29 U.S.C. § 158(a)(1). Section 7 of the Act protects employees' right to engage in "concerted activity" for the purposes of "collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. "No one doubts that the processing of a grievance" under a collective bargaining agreement "is concerted activity within the meaning of § 7" (*NLRB v. City Disposal Systems, Inc*., 465 U.S. 822, 836 (1984)) and therefore it is violative of the Act to interfere, restrain or coerce employees in their grievance-filing activities. *Yellow Transportation, Inc.*, 343 NLRB No. 9, slip op. at 5 (2004); *Prime Time Shuttle International*, 314 NLRB 838, 841 (1994).

The Government alleges that Spadaro's statements to Travnik at the December 2004 meeting with Travnik and Sayre at the Bob's Big Boy restaurant violated Section 8(a)(1) of the Act. As discussed, Spadaro admitted that he told Travnik that in order for Spadaro to attempt to have Sysco reinstate Travnik, Travnik would have to, among other things, "forget about those stupid fucking grievances." This demand that Travnik agree to forego (or limit) protected, concerted activity as a condition for Spadaro initiating an effort to seek Travnik's reinstatement would reasonably—obviously, I think—tend to interfere with the free exercise of employee rights, and therefore is violative of Section 8(a)(1).[19]

Respondent contends that Spadaro's remark should not be found to be a violation of the Act because Spadaro often uses profanity, neither Travnik nor Sayre took offense, and what he meant by the "stupid" grievance comment was a reference to a specific grievance filed many years ago. However, in determining the coerciveness of a remark, the Board applies an objective standard of whether the remark reasonably tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect. *Miller Electric Pump & Plumbing*, 334 NLRB 824, 825 (2001); *Joy Recovery Technology Corp*., 320 NLRB 356, 365 (1995), enfd. 134 F3d. 1307 (7th Cir. 1998). Thus, Spadaro's intention or purpose in making his comment to Travnik is irrelevant.[20]

There is also no merit to the contention that Spadaro's comment at the meeting cannot be the basis for an unfair labor practice violation because the comment was made in "compromise negotiations" and therefore is inadmissible pursuant to Federal Rule of Evidence 408. Not only did Respondent fail to preserve this objection at trial, but settlement discussions are in-

[18] For instance, both Sayre and Travnik, but not Spadaro, referenced mention of a Sysco corporate figure with whom Spadaro was going to discuss Travnik's reinstatement.

[19] See e.g., *Davey Roofing Co.*, 341 NLRB 222, 224, 238 (2004) (unlawful for supervisor to tell employee discharged for cause that he could help him get his job back if he took his name off union petition); *East Texas Pulp & Paper Co.*, 143 NLRB 427 (1963) (unlawful to pressure former employees to withdraw grievances by conditioning employment recommendations on withdrawal of grievances), enfd. 346 F.2d 686 (5th Cir. 1965).

[20] Over the objection of counsel for the General Counsel I permitted Spadaro to answer a question posed to him by Respondent's counsel regarding what he "meant" by his comment. I permitted the answer because I believed it potentially relevant to the 8(a)(3) discharge allegation, but it is irrelevant to the 8(a)(1) violation that occurred at the restaurant.

admissible only to prove liability for the matter being settled. Rule 408 does not apply to an alleged wrong committed in the course of settlement discussions, and it does not apply to a statement relevant to claims other than those being settled in the discussions.[21] Spadaro's statement is both. His comment at the meeting is an 8(a)(1) violation and it is relevant to the 8(a)(3) allegation, neither of which was a subject of the parties' settlement efforts.[22]

Finally, I also do not accept Respondent's contention that Spadaro's comments cannot be imputed to Respondent on the (assiduously emphasized) grounds that he attended the meeting as a "favor" to Sayre and Travnik, that the meeting was "off the record," and his attendance not "authorized." The characterization of this meeting as a "favor" cannot change the fact that this meeting was initiated by a union representative with an employer representative who had supervisory and labor relations responsibilities. The meeting was called and attended for the sole purpose of discussing the subject of an employee's discharge and the possibility of the employee's reinstatement. Not that it would necessarily matter, but it is not the case that the three accidentally met at a charitable, social, or other nonwork event and had a casual conversation about Travnik's discharge. Travnik's discharge was the reason for the meeting. The meeting was called with Spadaro precisely because of his indisputably supervisory and agency status with Respondent. He was not the only or ultimate decision maker in Travnik's discharge, but he initiated the investigation into Travnik. And it was Spadaro's recommendation that Travnik be terminated that was the basis for the Company's action, after review and approval of the recommendation by upper management. His boss Cook admitted that Spadaro had the authority to recommend an employee's reinstatement and "make a case" for the employee. The fact that this labor relations meeting was not part of the standard grievance process and that Spadaro had no contractual obligation to attend the meeting is irrelevant. Labor relations is not practiced in regimented fashion, and the outcome of a grievance procedure is often the product of many types of meetings, formal and informal. Respondent's responsibility for its supervisor's labor relations conduct is not limited to meetings that someone higher up specifically knows about in advance.[23]

Spadaro spoke as a representative of Sysco. That does not mean that he was in a position to offer reinstatement to Travnik, but he warned Travnik that if he wanted to have a chance of reinstatement, and if he wanted Spadaro's assistance to that end, he would have to "forget" about grievance filing (at least forget about filing "stupid" grievances). This would reasonably tend to interfere with the exercise of rights protected by Section 7.

B. The 8(a)(1) and (3) Allegation: Travnik's Discharge

As discussed, above, Travnik's grievance filing activity was protected by the Act. It is a violation of the Act to discharge an employee in retaliation for filing grievances. *Yellow Transportation, Inc.*, supra; *LB&B Associates, Inc*., 340 NLRB 214 (2003).

The Government contends that the Travnik's exercise of his protected right to file grievances motivated Respondent to discharge him. Respondent denies this and contends that its discharge of Travnik was legitimately motivated. It claims that it fired him because he violated work rule 1-4.

The Supreme Court-approved analysis in 8(a)(1) and (3) cases turning on employer motivation was established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See, *NLRB v. Transportation Management. Corp*., 462 U.S. 393, 395 (1983) (approving *Wright Line* analysis). In *Wright Line* the Board determined that the General Counsel carries the burden of persuading by a preponderance of the evidence that the employee's protected conduct was a motivating factor, in whole or in part, for the employer's adverse employment action. Proof of such discriminatory motivation can be based on direct evidence or

[21] *Lenox Hill Hospital*, 327 NLRB 1065, 1067 fn. 4 (1999) (Rule 408 does not bar grievance settlement discussions offered in unfair labor practice proceeding to show relevance of union's information request to grievance); *Miami Systems Corp*., 320 NLRB 71 fn. 2 (1995) ("evidence of threats made . . . during informal grievance settlement discussions . . . is not inadmissible under Rule 408 of the Federal Rules of Evidence"), enfd. in relevant part sub nom. *Uforma/ Shelby Inc. v. NLRB*, 111 F.3d 1284, 1293–1294 (1997) (assuming Rule 408 applies "we hold that Rule 408 does not exclude evidence of alleged threats to retaliate for protected activity when the statements occurred during negotiations focused on the protected activity and the evidence serves to prove liability either for making, or later acting upon, the threats").

[22] For reasons that elude me Respondent relies upon *Miami Systems*, supra in support of its argument. That decision unequivocally rejects Respondent's position. Respondent also cites *Contee Sand & Gravel*, 274 NLRB 574 (1985), which involved an alleged refusal to sign new labor agreements. The Board refused to admit evidence of past settlement discussions intended to settle a previous unfair labor practice. The previous unfair labor practice concerned the respondent's failure to honor collective-bargaining agreements. In those circumstances, the Board found "that the alleged new collective-bargaining agreements were so closely intertwined with the unfair labor practices then under discussion that they cannot be separated therefrom" and Rule 408 barred the discussions from being used against the employer. Spadaro's discussions with Travnik and Sayre were for the purpose of settling a contractual grievance, i.e., a breach of contract claim. The settlement of unfair labor practices was not under discussion. Indeed, at the time, as Respondent otherwise emphasizes in its defense, there had not even been an assertion of discriminatory motive for the discharge.

[23] *Glenroy Construction Co.*, 215 NLRB 866, 867 (1974) (employer violated Act based on supervisor's unauthorized and "personal" statement to employee that "he" did not want employee back to work because of Board charges filed by employee, even though employer was willing to reinstate employee and was waiting for employee to return to work), enfd. 527 F.2d 465 (7th Cir. 1975). Accord, *Ideal Elevator Corp*., 295 NLRB 347 (1989) ("the Board continues to hold that under Sec. 2(13) of the Act 'an employer is bound by the acts and statements of its supervisors whether specifically authorized or not.'" Quoting *Dorothy Shamrock Coal Co*., 279 NLRB 1298, 1299 (1986) enfd. 833 F.2d 1263 (7th Cir. 1987); *Triangle Sheet Metal Works*, 238 NLRB 517, 520 (1978) ("even though Biegler's comments were not authorized by higher management, he plainly was a supervisor and an agent of Respondent within the meaning of the Act and, therefore, his conduct is legally attributable to Respondent"); *Fotomat Corp.*, 199 NLRB 732, 733 (1972) (supervisor's statement that he "would not doubt the Company would go [as] far" as to close plant in response to unionization was attributable to management).

can be inferred from circumstantial evidence based on the record as a whole. *Robert Orr/Sysco Food Services*, 343 NLRB No. 123, slip op. at 2 (2004); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).[24] Such a showing proves a violation of the Act subject to the following affirmative defense available to the employer: the employer, even if it fails to meet or neutralize the General Counsel's showing, can avoid the finding that it violated the Act by demonstrating by a preponderance of the evidence that the same adverse employment action would have taken place even in the absence of the protected conduct. For the employer to meet its *Wright Line* burden, it is not sufficient for the employer simply to produce a legitimate basis for the action in question. It must "persuade" by a preponderance of the evidence that it would have taken the same action in the absence of protected conduct.[25]

Turning first to General Counsel's initial burden, to carry his burden the General Counsel must show "'(1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer's action.'" *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999) (quoting *FPC Moldings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995), enfg. 314 NLRB 1169 (1994)).

Here, there is no doubt that Respondent was aware of Travnik's grievance filing activity. Respondent knew of it because grievances are presented to and considered by supervisors. Notwithstanding the testimony of Respondent's witnesses that no records were kept tracking individual grievance filings, naturally there was a file for each grievance in Respondent's possession and on Knull's computer these files were denominated by the name of the principal employee grievant. (R. Exhs. 8-12). The grievances filed by Travnik were titled "Travnik" in the computer folder devoted to grievances. Of course, apart from routine consideration of Travnik's grievances (along with hundreds others) it is clear that Respondent was specifically aware of Travnik's grievance-filing activity because, as I have found, Cook told Travnik so in June and July 2004 and so did Spadaro at the Bob's Big Boy in December 2004. Spadaro's comment—to the effect that among the range of things necessary for Spadaro to "stick [his] neck out" for Travnik was Travnik's agreement to stop filing "stupid fuckin' grievances" obviously reflects consciousness of Travnik's history of filing grievances.

There is also evidence that Travnik's grievance-filing activity provided a motivation for Travnik's discharge, specifically Spadaro's postdischarge statement to Travnik at the restaurant and Cook's comments in June and July to Travnik about his filing of grievances.[26]

Cook is a senior management official of Respondent, and his comments to Travnik are not to be taken lightly. Cook's comments, at a minimum, belie the nonchalance with which Respondent claims it viewed Travnik's grievance filing. His June comment to Travnik expressly linked Travnik's grievance filing to the suggestion that he "find work somewhere else."[27] Spadaro's comment indicated a dislike of Travnik's grievance filing activities and a willingness—equipped with the leverage provided by the discharge—to pressure him to stop it. That constitutes direct evidence of animus toward specific protected conduct, by a supervisor directly responsible for the decision to discharge Travnik. I believe that Spadaro was speaking candidly and (as Respondent emphasizes) "off the record" to Travnik at the restaurant meeting. He was being asked by the Union and Travnik to make an effort on Travnik's behalf. Spadaro had recommended Travnik's discharge, and his response clearly suggests a consciousness and dislike of his grievance filing, and a willingness to seize the opportunity to chastise Travnik for it. The fact that Spadaro believed (and conveyed) that a reformed Travnik—one who promised, among other things, to curb or forego grievance-filing—would be a more attractive candidate for reinstatement provides a strong basis from which to infer that the decision-making process in Travnik's discharge involved consideration of his grievance-filling activity.

At least to some degree. Neither Spadaro's conversation with Travnik, nor the evidence generally, suggests that Travnik's grievance-filing activity was the sole or main reason for the discharge. Indeed, the larger picture calls into question the extent of Travnik's grievance-filing as a motive for the dis-

[24] "To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the union activity." *Robert Orr/Sysco Food Services*, supra.

[25] *NLRB v. Transportation Management*, 462 U.S. 393, 395 (1983) (rejecting employer's claim that its burden is met by demonstration of a legitimate basis for the discharge); *Carpenter Technology Corp.*, 346 NLRB No. 73, slip op. at 8 (2006) (The issue is, thus, not simply whether the employer 'could have' disciplined the employee, but whether it 'would have' done so, regardless of his union activities"). *Weldun International*, 321 NLRB 733 (1996) ("The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must persuade that the action would have taken place absent protected conduct by a preponderance of the evidence") (internal quotation omitted), enfd. in relevant part 165 F.3d 28 (6th Cir. 1998).

[26] I do not include McDonald's comments to Travnik in this list. That a supervisor would occasionally say things like "[n]ot another one" and "[o]h geez what did I do now," is just so much shop talk. In this context it is not evidence of animus toward protected activity. The Act does not require a front-line supervisor to like getting grievances. They are, after all, complaints about management conduct. Travnik agrees that McDonald always handled the grievances appropriately and processed them correctly. The comments, for which no time period or other detail was provided, do not add anything to the General Counsel's case. Witnik's 1999 note responding to a grievance filed by Travnik is worth considering in this regard. It expresses obvious irritation and disdain for the merits of the grievance that Travnik is filing. Such frustration is potentially a catalyst for unlawful animus, but it does not amount to evidence of it. A vital collective-bargaining relationship frequently, perhaps necessarily, will involve some contention and frustration with the other side. Witnik and McDonald's comments reflect that. More important and probative, is that Travnik's grievances were always processed.

[27] The General Counsel does not contend that Cook's comment violated the Act—presumably because of 10(b) concerns—and therefore I do not find a violation. See however, *Chinese Daily News*, 346 NLRB No. 81, slip op. 1 & 14 (2006).

charge.

In this regard (and these points are discussed in more depth below in consideration for Respondent's defense), I think that Respondent's regular, copious, and (by all evidence) uneventful processing and handling of grievances is relevant. The plant had 418 grievances in 2004. Respondent went to some length at trial to demonstrate that it does not avoid its contractual or statutory obligations with regard to grievances. Aside from the cited evidence regarding Travnik, no evidence of animus toward grievance-filers specifically or generally exists on the record and there are other employees with a significant record of filing grievances. Indeed, many of the circumstantial indicia from which the Board typically infers unlawful motivation were not part of the General Counsel's case. For instance, the timing of the discharge was not closely linked to Travnik's protected activity. He filed 14 grievances between January and May 2004 but had filed only 3 from June to October before being discharged in November, 2004. The employer's proffered explanation for Travnik's discharge remained consistent from the initial investigation to discharge. I do view Respondent's treatment of Travnik as harsh, particularly for a 15-year employee whose work was generally praised by Respondent's witnesses, but in the context of Respondent's repeated application of a rule that explicitly provides for discharge upon the first violation, the treatment of Travnik while harsh, is not so harsh—or, more to the point, out of line with Respondent's practices—that it invites suspicion that it was a pretext for discriminatory motive.[28]

In sum, on this record, I believe that the General Counsel has met his initial burden, but the evidence establishes only that antiunion animus contributed a minor part of the decision to discharge Travnik. Of course, as explained, supra, under *Wright Line*, a discharge motivated even in small part by unlawful considerations is unlawful, subject to the employer's demonstration that in the absence of protected activity the adverse employment action would have been taken anyway. However, logically, the force of the General Counsel's initial showing is directly related to the force of evidence required by the employer to meet its burden. Where the General Counsel has made the case that antiunion animus loomed large as a motive for the discharge, the Respondent's burden to show it would have taken the same action in the absence of protected activity is "formidable." *Garvey Marine, Inc.*, 328 NLRB 991, 992 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001); *Alterman Transport Lines*, 308 NLRB 1282, 1293 (1992). The converse is also true. Where, as here, the General Counsel initially makes a showing that protected conduct was a motivating factor—but not a large factor—the Respondent's burden to show that the adverse action would have occurred in the absence of protected activity, is lighter. In this case, Respondent has met that burden.

First, Respondent's asserted reason for discharging Travnik—violation of work rule 1.4—was consistently maintained at all times. It never deviated at any point in the discharge and grievance process from the position that the basis of the discharge was a violation of work rule 1.4 based on excessive breaks and lunches. Excessive bathroom time was noted, but ultimately not relied upon in deference to Travnik's contentions that illness caused significant vomiting and diarrhea during this time. Moreover, no evidence was presented that other employees found in violation of work rule 1-4 were not discharged. In each instance where an employee was discharged for 1-4, but reinstated, Sysco witnesses credibly explained that the grievance procedure or Sysco's own investigation uncovered evidence from which Sysco concluded that there was not a violation. Similarly, when videotaping of an employee suspected of a work rule 1-4 violation revealed that there was not one, the employee was not discharged. Obviously, such examples not only undercut any contention that these employees' reinstatement evidences discriminatory treatment of Travnik, but also highlight the effectiveness of the grievance procedure (or the employer's investigation to prepare for it) to uncover and remedy cases where Sysco's actions were vulnerable. In this case, the investigation and grievance procedure did not produce any significant questions that could reasonably undermine Sysco's belief that Travnik violated work rule 1-4.

In this regard, a copy of the videotape relied upon by Sysco was shown at trial and appeared consistent with log prepared by Witnik and was consistent with the allegations against Travnik made by Sysco. This includes the perception from the video that at times Travnik was actively avoiding supervision, instances that hardened the determination of individual Sysco managers not to relent on the discharge penalty. (Tr. 368, 453, 562–564). Just as there was no way for the Union or Travnik to claim in the grievance procedure that the events on the tape did not happen, or that it was not Travnik on the tape, or to cite some other flaw in the tape that calls into question the accuracy of the surveillance tape, the General Counsel is circumscribed from effectively questioning Sysco's motives based on the content of the video footage.[29]

On brief, the General Counsel's chief challenge is not to Sysco's analysis of Travnik's conduct. Rather, the General Counsel disputes Respondent's position that Travnik was contractually entitled to 70 minutes of break (including lunch) per shift. The General Counsel contends that Travnik was contractually entitled to 88 minutes of break (including lunch) per

[28] "Although the Board cannot substitute its judgment for that of an employer and decide what would have constituted appropriate discipline, the Board does have the role of deciding whether the employer's proffered reasons for its action is the actual one, rather than a pretext to disguise antiunion motivation." *Construction Products Inc.*, 346 NLRB No. 60, slip op. at 7 (2006); *Detroit Paneling Systems*, 330 NLRB 1170 (2000); *Uniroyal Technology Corp. v. NLRB*, 151 F.3d 666, 670 (7th Cir. 1998).

[29] The General Counsel notes that the chapter menu titles on the DVDs entered into evidence indicate dates (1/1/03 & 11/11/04) that are not consistent with the dates the footage was recorded, or the date the footage was transferred from the Multiplexor to the DVD. The most likely explanation for this is that the Magnavox DVD system, which was a new piece of equipment, had not been set to the correct date when the DVDs were created. The wrong date on the DVD chapter titles does not call into question the veracity of the video footage copied onto the DVDs. There is no suggestion by the General Counsel, and no evidence, that the video footage itself, which carries a date and second by second time marker contemporaneously recorded by the multiplexor, is inaccurate.

shift. If the General Counsel were right, it would reduce significantly the extent of excess breaktime that Travnik took. Under the General Counsel's 88-minute break per shift calculation, Travnik's excess breaktime amounted to 6 minutes on the October 17 shift, no excess on October 18 or 19, and only 3 minutes excess on October 20. The difference in breaktime calculation is rooted in the General Counsel's (and Travnik's) view that Travnik was entitled to a 10-minute freezer break each shift, as well as 3 minutes "travel time" added on to each break he took during a shift. The difficulty with this argument—apart from the fact that none of Travnik's breaks occurred at the 3-1/2 hour mark in his shift when freezer breaks were taken—is that it is an argument that is appropriate for an arbitrator, but somewhat beside the point here. The question for the Board is not whether Travnik violated work rule 1-4, and its task is not to determine the appropriate amount of break time under the contract. The question for the Board is whether Sysco had a good faith belief that Travnik violated work rule 1-4, acted on that belief when they discharged him, and would have done so even in the absence of his grievance filing.[30] Certainly the bona fides of Respondent's argument that Travnik was discharged for a violation of work rule 1-4 would be called into question by an outlandish contractual argument, or an argument that, for any combination of reasons, reflected poorly on the subjective good faith of Respondent. But that is not the case here. As to its contractual argument, Respondent's position that Travnik was not entitled to freezer breaks, whether or not "correct," appears sincerely and consistently held, is substantial, and it is not without significance that the other party to the labor agreement, the Union, does not appear to have disputed Respondent's position in this regard.[31] Similarly, Respondent's position that travel time is not available to employees in Travnik's job and, in any event, is not additional breaktime for employees, was credibly explained. All evidence supports the conclusion that Respondent's position was taken in good faith, may, in fact, be correct, and again, there is no evidence that the other party to the contract, the Union, disputes Respondent's interpretation.[32] In sum, I find that Sysco believed in good faith that Travnik took excessive breaks and lunch and in doing so violated work rule 1-4.

As I mentioned, supra, there is a harshness to the penalty here given Travnik's veteran employee status (15 1/2 years at discharge) and, by all evidence, lack of a prior disciplinary record. Yet, in comparison to the other employees terminated for work rule 1-4 violations, it is hard to read too much into this. At least some of the other employees also had significant years of service at the time of their discharge (Shuster (15 years), Unkefer (24-1/2 years), Shields (10 years), and Washington (described as a "longtime" employee). For Travnik, Sysco documented and based the discharge on less time "stolen" than for most other employees, but not for all (such as Goodreau, although it is true that his discharge cited the length of time to fill orders in addition to 1-4)), and the time of others was not included on the record. While there are some individual variances, collectively the application of work rule 1-4 to other employees displays a uniformity and continuity that supports Respondent's defense. *Great Lakes Window*, 319 NLRB 615 (1995), enfd. mem. 155 LRRM (BNA) 2384 (6th Cir.

[30] As the Board explained in *McKesson Drug Co.*, 337 NLRB 935, 936 fn.7 (2002), "[i]n order to meet its burden under *Wright Line* (i.e., to show that it would have discharged the employee even in the absence of protected activity), an employer need not prove that the employee committed the alleged offense. However, the employer must show that it had a reasonable belief that the employee committed the offense, and that it acted on that belief when it discharged him." See also, *Yuker Construction*, 335 NLRB 1072 (2001) (discharge of employee based on mistaken belief does not constitute unfair labor practice, as employer may discharge an employee for any reason, whether or not it is just, so long as it is not for protected activity); *Affiliated Foods, Inc.*, 328 NLRB 1107, 1107 fn.1 (1999) (it was not necessary for employer to prove that misconduct actually occurred to meet burden and show that it would have discharged employees regardless of their protected activities; demonstrating reasonable, good-faith belief that employees had engaged in misconduct was sufficient).

[31] The labor agreement provides for 10-minute "freezer breaks" for "freezer employees." Travnik was a "freezer employee" in the sense that he held a bid from the freezer bid job. However, Respondent's position is that freezer or "warm up" breaks" were permitted at the 3-1/2-hour mark of a shift for employees who had been actually working in the freezer for the shift. Travnik remained in his "freezer bid" position even after April 2004 when, as the only third-shift returns employee, his responsibilities included all returns not just frozen returns. He remained in his "freezer bid" position even at the new facility where there was no freezer dock, and frozen returns were left on a cooled but not frozen dock. Thus, notwithstanding his job bid, Travnik's work involved significant responsibilities and time in nonfreezer areas. According to Sysco, Travnik was not entitled to freezer breaks, and this was understood, as the purpose of and entitlement to freezer breaks was to let people who had been in the freezer warm up. This was the position Sysco took in the grievance procedure (it appears to have been only briefly mentioned by Travnik). This is, of course, an archetypical contractual interpretation dispute that would be grist for an arbitrator's mill, had the Union wanted to dispute Sysco's position. However, there is no evidence, either from the hearing in this matter, or the record of the grievance proceedings, that the Union disagrees with Sysco's interpretation. There is also no evidence that Sysco's interpretation was inconsistently applied or insincerely held. No evidence suggests that the breaks for which Travnik was fired were freezer breaks and Sysco's consistent testimony is that freezer breaks had nothing to do with Travnik's discharge. In sum, even assuming, arguendo, that an arbitrator would side with Travnik and against Sysco on the question of Travnik's entitlement to freezer breaks, it does not advance the General Counsel's position in this case, because a good faith but erroneous view of the contract does not help to show unlawful motivation for discharge. I find that Sysco management believed that Travnik's work and position did not entitle him to freezer breaks, especially in the new facility from which he was fired.

[32] A significant amount of testimony was devoted to explicating the concept of "travel time." Travel time as credibly explained by Sysco witnesses is not extra time allotted for breaks, but instead, time that is deducted from the denominator (if you will) when productivity calculations are made for those positions that were subject to engineered standards. Not only, by all evidence, was Travnik not on an engineered standards job—and therefore not entitled to travel time—but even if he were, according to Sysco it would not extend the time of his breaks. It is not additional breaktime, but a factor incorporated into productivity measures. However, again, as with freezer breaks, the ultimate disposition of this contractual dispute is beside the point, as there is no basis for concluding that Sysco's view on travel time was part of an effort to disguise discriminatory animus towards Travnik.

1997). Particularly in the context of a rule that explicitly warns of discharge for a first violation, the harshness of Travnik's discharge is not suspect. To the contrary, Respondent's repeated discharge of other employees for violation of work rule 1-4 adds weight to Respondent's defense.[33]

Nor is there any evidentiary support for the General Counsel's suggestion that—based on his grievance filing—Travnik was singled out for surveillance. The uncontradicted evidence was that the investigation began when Dowd complained to Spadaro that he couldn't find Travnik on a shift when returns were heavy and it appeared that work was not being performed. No evidence was presented that these events did not happen this way and, at least in the case of whether Travnik was available when Dowd was looking for him, Travnik would have been in a position to contradict that were it not true. There is also uncontradicted testimony that in past instances involving other employees, videotape surveillance had similarly been initiated and relied upon to discharge employees. I think that the evidence supports the conclusion that the initiation of surveillance was not the result of animus towards protected activity.

I think that the evidence relied upon by Sysco to discharge Travnik provided the basis for a good faith belief that Travnik violated work rule 1-4. And I find that in discharging Travnik Sysco acted on that belief. Particularly in light of Cook and Spadaro's comments, it is easy to accept that Travnik's grievance-filing may have contributed to Respondent's decision to mete out the penalty of discharge and carry through with it in the face of the Union's grievance. However, I find that Sysco has persuaded that it would have discharged Travnik even in the absence of Travnik's protected activity. This allegation of the complaint should be dismissed.

CONCLUSIONS OF LAW

1. Respondent Sysco Food Services of Cleveland is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. By telling Charging Party Jeffrey Travnik that he would have to agree to limit or forgo grievance filing in order to be considered for reinstatement, Respondent violated Section 8(a)(1) of the Act.

3. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Respondent Sysco shall post an appropriate informational notice, as described in Appendix A, attached. This notice shall be posted in Respondent's facility or wherever notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. When the notice is issued to Respondent, it shall sign it or otherwise notify Region 8 what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[34]

ORDER

The Respondent, Sysco Food Services of Cleveland, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that they must agree to limit or forgo grievance-filing activity in order to be considered for reinstatement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act.

(a) Within 14 days after service by the Region, post at its facilities in Cleveland, Ohio, copies of the attached notice marked Appendix."[35] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Within 21 days after service by the Region, file with the Regional Director of Region 8 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with the provisions of this Order.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., June 7, 2006

[33] Evidence shows that 3 employees were discharged for violation of Rule 1-4 in the 24 months before Travnik's discharge and 5 in the 16 months subsequent to Travnik's discharge. The General Counsel contends, without authority, that the evidence of employees discharged for work rule 1-4 violations *subsequent* to Travnik's discharge is irrelevant. I disagree. I recognize that in certain circumstances subsequent discharges can be less reliable as comparators, and in certain cases, could be evidence of unlawfully motivated stricter enforcement of rules. But in either case the postdischarge comparators are hardly irrelevant. Here, I draw the most likely conclusion: Respondent consistently discharged employees for violations of work rule 1-4. Without any further evidence, the fact that there was an increase in work rule 1-4 discharges (5 in 16 months versus 3 in 24 months) after Travnik's discharge is not a basis to infer misconduct.

[34] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[35] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT tell employees that they must agree to limit or forgo grievance-filing activity in order to be considered for reinstatement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

SYSCO FOOD SERVICES OF CLEVELAND, INC.